No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

INTERVENORS-RESPONDENTS JANE DOES' BRIEF IN SUPPORT OF CERTIORARI

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QUESTIONS PRESENTED

On November 20, 2014, the Secretary of the Department of Homeland Security issued a guidance memorandum (Guidance) directing his subordinates to consider discretionary grants of deferred action for removable undocumented immigrants meeting certain specified criteria. The Guidance provides for uniformity in the exercise of discretion across the Department's agencies and its employees authorized to grant deferred action. Deferred action is a temporary forbearance from removal, and by itself conveys no enforceable rights or benefits on its recipients.

The questions presented are:

1. Whether a State has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, to challenge the Secretary's exercise of immigration enforcement discretion, simply because an increase in the number of immigrants receiving deferred action might ultimately increase the net costs of the State's driver's license program.

2. Whether the Guidance is arbitrary and capricious or otherwise not in accordance with law.

3. Whether the Guidance was subject to the APA's notice-and-comment procedures.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners and Respondents are as described in the Petition. Pet. II.

Intervenors are three individuals who proceed under the pseudonyms Jane Doe #1, Jane Doe #2, and Jane Doe #3 in this litigation. They are undocumented immigrant mothers of U.S. citizen children and longtime residents of Texas, and they will be eligible to apply for deferred action if the Guidance is implemented. Intervenors were parties in the proceeding below at the time of the filing of the Petition and are respondents in this Court. S. Ct. Rule 12.6.

Intervenors first participated as *amici curiae* in the court of appeals while simultaneously appealing the district court's denial of their January 2015 motion to intervene. On November 9, 2015, the same three-judge panel of the court of appeals that affirmed the preliminary injunction unanimously reversed the denial of intervention. *Texas v. United States*, 805 F.3d 653 (5th Cir. 2015).

On November 18, 2015, Intervenors moved to intervene as parties in the injunction appeal to ensure they could participate as parties in this Court. The court of appeals granted the motion to intervene on November 19, 2015, prior to the filing of the Petition on November 20, 2015. Order, *Texas v. United States*, No. 15-40238 (5th Cir. Nov. 19, 2015); *see also* S. Ct. Rule 12.6 ("All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court[.] . . . All parties other than the petitioner are considered respondents[.]"); *INS v. Chadha*, 462 U.S.

919, 930 n.5 (1983) (Ninth Circuit's grant of intervention after judgment made former *amici* proper parties for purposes of seeking review in this Court).

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INTRODUCTION

By upholding a nationwide preliminary injunction blocking the Executive's exercise of prosecutorial discretion in immigration enforcement, the court of appeals has injected the judicial branch into a national policy disagreement between the Executive and certain States in contravention of the strict limitations that "serve[] to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1146 (2013); *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The courts below had no jurisdiction, the injunction was wrongly affirmed on the merits, and the injury it is causing is severe. This Court should grant the petition for writ of certiorari.

The court of appeals' decision is based on a fundamental misconception of what the Deferred Action Guidance does. The Guidance does not, as Respondents have repeatedly claimed, affirmatively grant legal immigration status and public benefits. Rather, it is nothing more than a set of guidelines the Secretary has established to systematically channel the exercise of his discretion, so as to ease the process of identifying immigrants who are low priorities for removal. Those immigrants who are individually determined to meet the criteria are then subject to deferred action, freeing up DHS's limited resources to pursue serious criminals, terrorists, and other threats. Recipients of deferred action can separately apply to the Secretary for work authorization, which he can grant under a long-existing regulation promulgated by notice-and-comment rulemaking. But de-

ferred action itself confers nothing more than the condition of being temporarily deprioritized for removal during the period of time the Secretary chooses to refrain from removing the recipient.

The court of appeals incorrectly rejected these facts, instead agreeing with Respondents that the Guidance is a binding grant of benefits and a proper subject for judicial review. That erroneous ruling has created the crisis this Court should now resolve. While the injunction is pending, the Secretary cannot properly focus DHS's scarce resources on removing criminals and threats to national security; the tax rolls are deprived of revenue and the economy suffers; and millions of undocumented immigrants like Intervenors are forced to remain in hiding and work outside the legal economy, unable to properly support their U.S. citizen children. These injuries will continue unless and until this Court grants review.

The court of appeals' misunderstanding of the Guidance was also the basis of its legal error. Contrary to the court's ruling, Respondents have no standing because the Guidance would, at most, have incidental effects on them, but would not cause them a judicially cognizable injury. Respondents' APA claims are unreviewable, for the Guidance confers no status or benefits. The procedural APA claim fails, because the Guidance is not binding. And the substantive APA claim fails since discretionary grants of traditional deferred action, the only things the Guidance *does* provide for, are perfectly compatible with existing law.

The serious injury inflicted by the decision below

and its numerous legal errors show the truth of this Court's prior warnings: the judicial power is limited, and it cannot be injected into "every sort of dispute, but only those historically viewed as capable of resolution through the judicial process." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (quotations omitted). The dispute presented between Respondent States and the Executive in this case is not one to which the judicial power can properly be applied. This Court should grant the immediate review Petitioners request.

REASONS FOR GRANTING THE PETITION

I. THE PRELIMINARY INJUNCTION IS CAUSING ONGOING INJURY TO NATIONAL SECURITY, THE PUBLIC FISC, AND MILLIONS OF INDIVIDUALS LIVING IN MIXED-STATUS FAMILIES

The preliminary injunction is hindering the Secretary's ability to enforce the immigration laws and causing severe harm to both the economy at large and millions of U.S. citizens, legal permanent residents (LPRs), and undocumented immigrants who are members of mixed-status families. By endorsing the district court's unprecedented decision to inject the judicial power into the Executive's policymaking, the court of appeals ensured that these harms will continue indefinitely unless this Court grants review.

The harms the injunction is causing are irreparable and should not be allowed to persist any longer than the time it takes for this Court to review the judgment below and issue a decision. Even if this Court determines that the injunction was improperly

issued and must be dissolved, it cannot undo the lost months in which Respondents have used the federal judicial power to prevent the Executive from implementing its discretionary enforcement power to prioritize candidates for removal, and in which Intervenors and millions of others in their situation have been forced to remain in the shadows, unable to legally support their families. Every day that the injunction remains in place is another day that the federal government cannot fully execute its immigration policy, that the U.S. economy cannot maximize its productivity, and that millions of parents of U.S. citizens and LPRs remain in fear of the unceasing threat of removal, unable to seek lawful employment.

A. The Injunction Is Interfering With The DHS Secretary's Decision To Focus DHS's Resources On The Removal Of Serious Criminals, Terrorists, And Other Threats To Public Safety

The Secretary issued the Guidance and the accompanying Prioritization Memorandum to focus DHS resources on removing immigrants who are threats to national security, public safety, and border security. *See* App. 411a-415a; App. 420a-425a. The two memoranda work together. While the Prioritization Memorandum sets forth a principle for DHS personnel to follow—that DHS's limited resources should be focused on removing serious criminals, terrorists, and other immigrants that are high-priorities for removal[1]—the Guidance allows that

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[1] This principle embodies the Secretary's discretionary interpretation of Congress's general instructions that he should

principle to be put into practice. By providing criteria for DHS personnel to use in identifying certain low-priority individuals and a time period in which the agency will refrain from removing them, DHS's enforcement resources can be allocated where they are most needed. App. 415a-419a; App. 423a-426a.

The injunction interferes with this structure by striking at the mechanism for implementing the Secretary's judgment: individual grants of deferred action pursuant to the Guidance processes known as DAPA and expanded DACA (DAPA). By preventing the Secretary from using the eligibility criteria laid out in the Guidance to guide the discretion of DHS personnel making fact-specific determinations for granting deferred action, the Secretary's ability to grant deferred action in a consistent manner to low-priority immigrants is severely constrained, and his attempts to put the Prioritization Memorandum's principle into practice are stymied.[2]

The court of appeals' argument that the injunction does not technically require DHS to abandon the Prioritization Memorandum ignores this practical problem. App. 44a, 87a. The Secretary has chosen

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focus enforcement resources on serious criminals and terrorists. *See* 8 U.S.C. § 1226(c); Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, 129 Stat. 39, 41-43 (2015).

[2] Thousands of DHS employees in a variety of agencies—notably Immigration and Customs Enforcement, the Border patrol, and Citizenship and Immigration Services—carry out the Secretary's enforcement priorities and decide whether to grant deferred action to individual immigrants. The Prioritization Memorandum and Guidance are necessary to ensure that the enforcement priorities and discretion to grant deferred action are applied appropriately and in a uniform manner.

to exercise his discretion to grant deferred action to specified low-priority immigrants as his method for ensuring that these individuals will come forward, identify themselves, and be counted. App. 415a-419a; App. 91a (King, J., dissenting) (dissent). As more low-priority immigrants are counted, registered, and granted deferred action, the total number of unknown, unaccounted-for immigrants declines. Having recorded their locations and determined that they are low priorities for removal, DHS can shift its enforcement resources away from these immigrants and turn instead to apprehending high-priority targets for immediate removal.

The injunction halts this carefully designed arrangement. With the Guidance enjoined, Intervenors and other immigrants in their situation have no reasonable surety that self-identification will not result in detention or removal.[3] Despite the Prioritization Memorandum refocusing resources on higher priority individuals, Intervenors and others in their position are still targeted for removal: "Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein." App. 426a. Indeed,

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[3] The surety the Guidance provides is incomplete, of course, since the "ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis" and "deferred action "may be terminated at any time in the agency's discretion." App. 413a, 419a. But the experience of 2012 DACA shows that undocumented immigrants who are likely to fulfill the eligibility criteria will step forward to apply when the Secretary implements a transparent process for making discretionary grants of deferred action.

the current administration has removed more individuals each year than any other. App. 91a n.1 (dissent); Mike Corones, *Tracking Obama's deportation numbers*, Reuters (Feb. 25, 2015). In the first six months of 2011 alone, 46,000 parents of U.S. citizens were removed. Joanna Dreby, Center for American Progress, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities* 1 (Aug. 20, 2012). And in 2013, Immigrations and Customs Enforcement removed 368,644 individuals, of which 41 percent had never been convicted of a crime. *ICE ERO Annual Report, FY 2013*, at 1-2.

Moreover, even if self-identification does not result in outright detention or removal, in the absence of uniform deferred action guidance and criteria for DHS employees to apply, Intervenors' requests for deferred action would likely be refused or, at minimum, would be subject to inconsistent, unpredictable treatment depending on the individual DHS employee encountered. Thus, with the injunction in place, Intervenors are unable to come forward and identify themselves. Low-priority undocumented immigrants will remain hidden, unknown to the Executive and without a known address. They remain targets for removal, hobbling DHS's ability to effectively allocate its resources and execute its objectives. Indeed, it was to avoid these very problems of inconsistent enforcement and spending enforcement resources on low-priority immigrants—and the resulting inhibition of effective community policing they caused—that forced the Secretary to revoke the controversial "Secure Communities" program and replace it with the Prioritization Memorandum. *See* Memorandum, *Secure Communities* 1 (Nov. 20, 2014); Homeland

Security Advisory Council, *Task Force on Secure Communities Findings and Recommendations* 16, 21 (Sept. 2011) (noting that Secure Communities "has resulted in the arrest and deportation of minor offenders" and that "enforcement against traffic offenders and others arrested only for minor offenses poses the greatest risks of undermining community policing"). While the injunction remains in place, DHS will continue to be impeded in its attempts to effectively allocate its enforcement resources.

B. While The Injunction Is In Place, Potential Recipients Of Deferred Action Remain Unable To Work Legally And Support Their U.S. Citizen Children

The injunction is also causing ongoing harm to public revenues, the broader economy, and mixed-status families by preventing breadwinners from supporting their U.S. citizen children in the legal economy. Deferred action would make these immigrants eligible to apply for work authorization under a long-established regulation. *See* 8 C.F.R. § 274a.12(c)(14). With work authorization, they could receive a social security number, begin legal employment, pay the same taxes as U.S. citizens, and possibly obtain private health insurance through their employers. At the same time, they would remain largely ineligible for the very social programs their taxes support. Furthermore, relieving the unending fear of removal would have a massive positive humanitarian impact, not only on the potential recipients of deferred action, but also on their U.S. citizen children and family members.

1. The injunction is directly harming public revenues by preventing the Secretary from granting work authorization to the low-priority immigrants who are the subject of the Guidance. Work authorization is associated with deferred action, but it comes from a separate legal source. Once granted, it is entirely beneficial to the States and the Federal Government: it ensures that the recipient is able to support herself and opens a new source of tax revenue but, with very few exceptions, does not itself allow the recipient to receive the benefits of the social programs her taxes support.

Work authorization has long been accepted as a non-controversial, necessary accompaniment to deferred action. Staying removal without allowing immigrants to work defeats the goal of allowing them to contribute to society. Instead, immigrants would be forced to remain in the shadow economy, where their unlawful employment would depress their wages, subject them to abuse by exploitative employers, and harm the economy at large. *Infra* I.B.2.

There is a long history of granting work authorization to recipients of deferred action. A century ago, this Court recognized the necessity of allowing immigrants permitted to remain in the country to work. *See Truax v. Raich*, 239 U.S. 33, 42 (1915) ("[Immigrants] cannot live where they cannot work."). The administration of President Reagan nearly 30 years ago promulgated a regulation that allows "[a]n alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority," to apply for work authorization "if the alien establishes

an economic necessity for employment." 8 C.F.R. § 274a.12(c)(14).[4] This established regulation, rather than the Guidance itself, is the legal mechanism that confers eligibility for lawful employment on recipients of deferred action. App. 417a-418a & n.4.

In 1990, the administration of President George H.W. Bush granted temporary permission to remain in the United States to a class of up to 1.5 million undocumented immigrants who were family members of lawful residents. *New Policy Aids Families of Aliens*, N.Y. Times, Mar. 5, 1990. This program also granted work authorization those immigrants. *Id.* Similarly, in 1997, the Immigration and Naturalization Service ("INS") established a deferred action program that applied to undocumented victims of domestic violence who appeared to qualify for relief under the Violence Against Women Act; grantees could apply for work authorization. D.Ct. Dkt. 38-11, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* 3 (May 6, 1997). In 2001, the INS allowed applicants for T and U visas to remain in the country through deferred action and other means. D.Ct. Dkt. 38-12, *Victims of Tra,ficking and Violence Protection Act of 2000, Policy Memorandum #2* 2 (Aug. 30, 2001). Again, recipients of deferred action were authorized to apply for work authorization by Section 274a.12(c)(14). *Id.* at 4. The administration of President George W. Bush later allowed foreign students affected by Hurricane Katrina to apply for deferred action, including eligi-

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[4] Either this regulation or its predecessor has been in effect since 1981. 46 Fed. Reg. 25,079, 25,080 (May 5, 1981); App. 110a (dissent).

bility for work authorization. D.Ct. Dkt. 38-13. All of these instances of temporary relief from removal included eligibility for lawful employment.

Thus, deferred action has traditionally provided a means by which recipients become limited participants in the economic state: They can work lawfully, contribute to the economy, and pay taxes, but they are unlikely to receive any social security or other benefits. Even though statutory law allows for recipients of deferred action to become eligible for retirement or disability insurance benefits (formally known as Old Age, Survivor, and Disability Insurance benefits) and Medicare, 8 U.S.C. § 1611(b)(2) (insurance benefits); 8 U.S.C. § 1611(b)(3) (Medicare); 42 U.S.C. § 402(y); 8 C.F.R. § 1.3(vi); they, like everyone else, must first pay into the system for 40 qualifying quarters, *i.e.*, 10 years of employment. 42 U.S.C. §§ 414(a)(1), (a)(2); 42 U.S.C. § 423(c)(1)(A) (requiring same for disability coverage); 42 U.S.C. § 426 (requiring same for Medicare). Additionally, recipients would have to remain in the United States until retirement age before taking any benefit. 42 U.S.C. § 402(a).

As in the past, because the Guidance only allows for three-year grants of deferred action and those grants can be revoked at any time, it is unlikely that any recipient of deferred action under the Guidance will realize a return on the social security taxes she pays. App. 416a-418a. Additionally, because only citizens, LPRs, and individuals "permanently residing in the United States under color of law" are eligible for Supplemental Security Income, recipients of deferred action are ineligible for the supplemental payments reserved for low-income aged, blind, or

disabled persons. *See* 42 U.S.C. § 1381 *et seq.*; 20 C.F.R. §§ 416.202(b), 416.1618(b) ("color of law" clause does not apply to recipients of deferred action.)

2. The injunction is causing injury on a broader economic level as well. The economic community is in agreement that immigration (both documented and undocumented) is a benefit both nationally and locally. *See* Adam Davidson, *Do Illegal Immigrants Actually Hurt the U.S. Economy?*, N.Y. Times Magazine (Feb. 12, 2013). Banishing undocumented workers to the shadow economy harms the larger economy, while increasing their economic integration produces positive effects. *See* Center for American Progress, *The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants* 2 (Mar. 20, 2013).

Currently, potential recipients of deferred action earn less and pay less in taxes than they would if the preliminary injunction were dissolved. The economic benefit of integrating them into the economy would be immediate if the injunction were lifted. As they gain lawful employment, many would pay payroll taxes for the first time, immediately boosting tax revenue. *See* Center for American Progress, *Administrative Action on Immigration Reform: The Fiscal Benefits of Temporary Work Permits* 2, 12 (Sept. 2014). Over 10 years, conservative estimates show the Guidance raising the GDP by 0.4 percent—the equivalent of adding $90 billion in real GDP by 2024. *See* The White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration* 6 (Nov. 2014). This would lower the deficit by $25 billion in that time. *Id.* at 12. More

optimistic estimates have the Guidance increasing the GDP by 0.9 percent and cutting $60 billion from the deficit over a decade. *Id.*

The injunction is also causing harm to State treasuries, including those of Respondents. Around 594,000 DAPA-eligible parents currently live in Texas. Center for American Progress, *Executive Action on Immigration Will Benefit Texas's Economy* (Nov. 2014). If these immigrants can receive work authorization, it would increase Respondent Texas's tax revenue by $338 million over 5 years, while the average recipient would take home an additional $1,900 annually. *Id.* And the increase in take-home pay will likely be returned to the economy rapidly because undocumented immigrants, like most workers in relatively low-wage jobs, must spend much of their earnings to make ends meet. *See* Davidson, *supra.*

States are obligated under current law to provide emergency medical care to individuals based on financial and medical need regardless of immigration status. *See* 8 U.S.C. § 1611(b)(1)(A); 42 U.S.C. §§ 1395dd, 1396a(a); 42 C.F.R. §§ 440.220(c), 442.255. When recipients of deferred action gain lawful employment and the corresponding increase in income, they will be less reliant on emergency medical care provided by hospitals and some will be able to obtain employer-provided insurance or purchase private insurance. They would be more able to afford preventive and primary care, both of which cost less and promote better long-term health than emergency intervention alone. *See* Michael V. Maciosek et al., *Greater Use Of Preventive Services In U.S. Health Care Could Save Lives At Little Or No Cost*, 29

Health Affairs 1656, 1660 (2010); Nat'l Ass'n of Comm. Health Ctrs., *Impact of Community Health Centers* 2 (Apr. 2007) (regarding high relative costs of emergency room care for injuries or diseases).

3. Millions of U.S. citizen and LPR children are forced to live in worse circumstances than they would if the Guidance had been implemented as planned. *See* USC Center for the Study of Immigrant Integration, *The Kids Aren't Alright – But They Could Be: The Impact of [DAPA] on Children* 1-2 (Mar. 2015) ("*The Kids Aren't Alright*") (estimating there are 6.3 million children, including 5.5 million U.S. citizens, with a parent who would be eligible for deferred action under DAPA). The average parent receiving deferred action and work authorization will see an approximately 8.5 percent increase in earnings, which will help provide for his or her children. *See Executive Action on Immigration Will Benefit Texas's Economy*, *supra*. In California alone, DAPA could lift 40,000 children above the poverty line. *The Kids Aren't Alright*, *supra*, at 4.

Moreover, implementing the Guidance will remove the constant fear that a family will be split by removal. In the first half of 2011, 46,000 parents of U.S. citizen children were removed. Dreby, *supra* at 1. The removal of a parent devastates families and often results in the placement of children in foster care. *Id.* at 9-10. In 2012, 5,100 children in foster care could not be reunited with their parents because the parents had been removed or detained. *Id.* at 10. And even if only one parent is removed, there is a corresponding increase in poverty levels. *Id.* at 9-10. Children in single-parent homes are at least four times more likely to live in poverty than chil-

dren with married parents. *Id.*

Only this Court's immediate review can put an end to the serious injuries being perpetuated by the preliminary injunction.

II. THE COURT OF APPEALS' DECISION UPENDS ESTABLISHED LAW BY INSTALLING THE FEDERAL COURTS AS THE ARBITERS OF IMMIGRATION POLICY DISPUTES

The court of appeals' decision is not only causing harm by allowing the nationwide injunction to remain in place. It is also wrong as a matter of established law. In misconstruing the Guidance as an affirmative grant of legal immigration status and public benefits to millions of undocumented immigrants, the court below misapplied the constitutional requirement of Article III standing and incorrectly held that the Guidance was a reviewable agency action both substantively unlawful and subject to notice-and-comment rulemaking. This decision sets a dangerous precedent that, unless immediately reviewed by this Court, will allow aggrieved parties, both individuals and states, to use the courts to interfere in discretionary federal policymaking, thereby constraining the Executive's performance of its constitutional duty to enforce the laws of the United States to the best of its ability. For this reason as well, the Court should grant certiorari and review the decision below.

A. A State Cannot Base Standing On The Incidental Effects Of A DHS Guidance Statement For Exercising Prosecutorial Discretion In Immigration Enforcement

1. Respondents lack standing to bring suit in federal court to challenge the Executive's immigration enforcement policy choices. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *accord Toll v. Moreno*, 458 U.S. 1, 10 (1982), and the States cannot use the federal courts to interfere with the exercise of this power. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers" that the Executive wields in the area of immigration policy and enforcement. *Clapper*, 133 S. Ct. at 1147. For these reasons, a litigant must make a special showing of Article III standing to challenge a federal immigration policy. *Cf. id.* ("[W]e have often found a lack of standing in cases where the Judiciary has been requested to review actions of the political branches in the field[] of . . . foreign affairs[.]").

A litigant must demonstrate the existence of an "injury [that] must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). The injury must be "concrete, particularized, and actual or imminent . . . [and] threatened injury must be *certainly* impending to constitute injury in fact[.]" *Clapper*, 133 S. Ct. at 1147 (emphasis original, quotations and citations omitted). This jurisdictional limitation is particularly acute here, where the immigration enforcement

policy at issue concerns the Secretary's exercise of his discretion to defer removals of immigrants "for humanitarian reasons or simply for [his] own convenience." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). As this Court has held, deferred action is a form of "prosecutorial discretion," *id.* at 484 n.9, and "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The same rule applies to Respondents, who "have no judicially cognizable interest in procuring enforcement of the immigration laws." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).

In their pleadings, Respondents alleged a host of generalized grievances but freely admitted that they brought suit because they disagree with the Secretary's policy decisions in an area of exclusive federal authority. D.Ct. Dkt. 14 ¶¶ 61-63, 69. This is insufficient for standing. Respondents alleged neither that they were targeted by the Guidance nor that they suffered the kind of concrete, particularized injury that could possibly give rise to a judicially cognizable interest in this suit. *Contra Wyoming v. Oklahoma*, 502 U.S. 437, 442-46 (1992) (standing found where Wyoming challenged a Oklahoma law specifically and overtly intended to reduce purchases of Wyoming coal and tax paid to Wyoming). There is no standing to bring a suit for the overt purpose of using the federal judicial power to dispute the Executive's discretionary policymaking decisions in the area of immigration enforcement.

2. Respondents cannot avoid this result by claiming that the Guidance would have incidental effects

on them. The district court and court of appeals found standing based on a single injury, crediting Respondent Texas's claims that the Guidance's implementation would require its Department of Public Safety to expend funds to handle an anticipated increase in driver's license applications. App. 20a-21a, 35a; D.Ct. Dkt. 64-43. Even if the increase in costs Texas complains of is not illusory, it is far too attenuated to be a basis for standing to challenge the Guidance. "When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Lujan*, 504 U.S. at 562 (emphasis original); App. 105a (dissent) ("I am skeptical that an incidental increase in state costs is sufficient to confer standing for the purposes of Article III.").

Texas's alleged future injury closely resembles the "speculative chain of possibilities" that was insufficient for standing in *Clapper*. *See Clapper*, 133 S. Ct. at 1148-49. Here, the costs Texas projects will only occur if (1) the Guidance results in a marked increase in the number of removable immigrants receiving deferred action; (2) those immigrants then apply to the Secretary for and receive work authorization; (3) a significant number of those immigrants subsequently apply for Texas driver's licenses using their work authorization to prove they are lawfully present; (4) the volume and timing of applications is such that Texas is required (as opposed to simply choosing) to expend significant resources on new employees, equipment, and office space; and (5) Texas does not offset the increased costs from the $25 fee it charges each applicant *or* reap the financial and regulatory benefits of bringing unlicensed, unin-

sured drivers into compliance with its laws. D.Ct. Dkt. 64-43 at 3-4; Tex. Dep't of Pub. Safety, *Driver License Division Fees* ($25 fee for "Limited Term Driver License: For Temporary Visitors to U.S.").

This is a "highly attenuated" chain of possibilities that in large part depends on "guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1148, 1150. Moreover, Texas's alleged costs are themselves highly speculative. Texas alleges that, to process the up to 520,000 additional license applications it estimates would result from issuing the Guidance, it would have to spend an additional $103 million over two years to hire 640 new employees and open 168,000 square feet of office space. D.Ct. Dkt. 64-43 at 3-4. Even in the unlikely scenario that 520,000 individuals would secure deferred action and then work authorization in the space of a year, and then all simultaneously apply for Texas driver's licenses, this would be a less-than-10 percent increase over the almost 5.4 million licenses (and 1.4 million identification cards) Texas issued in fiscal 2014, when the driver license division had no more than 1,808 full-time employee positions and its total budget was $119 million. *See* Tex. Dep't of Pub. Safety, *Annual Report: Fiscal Year 2014* 6, 10 (2014). Additionally, the projected 520,000 additional applications would bring $13 million in licensing fees for Texas, revenue that would offset much (if not all) of the increased costs Texas actually incurred. *Cf.* Tex. Dep't of Pub. Safety, *Operating Budget for Fiscal Year 2014* III.A.38, III.A.40, IV.D.5 (Dec. 1, 2013) (estimating that fiscal 2014 would see $125.3 million in revenue on 6.1 million licenses and identification cards is-

sued, on less than $124 million in total costs).

As a result, Texas is unable to demonstrate the kind of "certainly impending" threatened injury-in-fact that is required for Article III standing. *Clapper*, 133 S. Ct. at 1147; *see also Allen v. Wright*, 468 U.S. 737, 756-59 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). But even if it could satisfy the injury element of standing, Texas's injury is not fairly traceable to the Guidance. The injury Texas claims is not the normal, ministerial cost of processing applications (since those costs are offset by the $25-per-application fee), but the costs of hiring new employees and expanding facilities to process an anticipated increase in license applications. But it is Texas's own choice whether it makes these expenditures instead of other administrative adjustments to meet the projected less-than-10 percent increase in application volume. Texas cannot "incur[] certain costs as a reasonable reaction to a risk of harm" and thereby "manufacture standing . . . based on [its] fears of a hypothetical future harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1151.

As the dissent noted, the court of appeals' standing ruling has no logical limit and would install the federal courts as the arbiters of most discretionary federal policymaking decisions. App. 106a. (dissent); *cf. Lujan*, 504 U.S. at 581 (Kennedy, J., concurring) ("[T]he requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government."). Almost any policy can be construed as imposing some kind of incidental financial cost on a State program—or at

least, as here, a willing declarant can be found to claim such a cost. In the field of immigration policy alone, allowing the court of appeals' ruling to stand would open the Secretary's decisions to second-guessing by the judiciary.

Indeed, if Texas can use the incidental costs of issuing driver's licenses to assert standing to challenge a policy of granting deferred action to parents of U.S. citizen children, California (for example) could claim standing to challenge a theoretical DHS policy to *increase* removals of those same immigrants, since removing more parents of U.S. citizen children would likely impose more costs on California's foster care system. *See* Applied Research Center, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System - Executive Summary* 4-6 (Nov. 2, 2011) (estimating at least 5,100 children in foster care whose parents had been detained or removed). Furthermore, although the court dismissed such concerns, App. 33a-36a, there is no reason why its ruling would not allow Respondents to challenge the grants of deferred action the Secretary makes on a case-by-case basis, so long as a single State could link those grants to some incidental expenditure of State funds.

3. *Massachusetts v. EPA*, 549 U.S. 497 (2007), far from providing a special or relaxed basis for jurisdiction, further demonstrates that Respondents lack standing. *Massachusetts* held that the State had standing to seek judicial review of the EPA's denial of a petition to regulate greenhouse gases, in part because,"[g]iven [its] procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special so-

licitude in our standing analysis." *Id.* at 520.

Respondent Texas has neither a procedural right nor any quasi-sovereign interests implicated by the Guidance. The procedural right in *Massachusetts* was specifically granted by Congress to, *inter alia*, allow the particular type of suit at issue: a suit to review the denial of a Clean Air Act rulemaking petition. *Massachusetts*, 549 U.S. at 516; 42 U.S.C. § 7607(b)(1). Here, the only statutory cause of action Texas can assert is the general right under the APA to seek review of an agency's final actions. But the generic APA cause of action is not the kind of procedural right contemplated by this Court in *Massachusetts*. "If the APA provides the requisite procedural right to file suit—as the majority indicates[]—and a state need only assert a 'quasi-sovereign interest' to get 'special solicitude,' then states can presumably challenge a wide array of federal regulatory actions." App. 103a (dissent). Indeed, this Court would have had no reason even to mention Section 7607(b)(1) in *Massachusetts*, given that the APA lurked in the background in that case as well. App. 102a n.13 (dissent).

Massachusetts also dealt with specific quasi-sovereign interests not at stake here: the State's special interests, not shared by private citizens, in protecting its territory—the physical land itself—from loss or harm. *See Massachusetts*, 549 U.S. at 518-19 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)). Moreover, those interests were directly tied to the procedural right Congress had provided in preempting the State's police powers. In enacting the Clean Air Act, Congress both preempted Massachusetts from enacting its own regulations of air pol-

lution and provided it a corresponding cause of action to challenge Executive decisionmaking. *Massachusetts*, 549 U.S. at 519-20. The same is not true here, where regulating the admission and exclusion of immigrants, and the conditions under which they remain in the United States, has always been a federal power, and Texas has not been provided a cause of action to challenge federal immigration enforcement decisions. "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government." *Truax*, 239 U.S. at 42; *see Arizona*, 132 S. Ct. at 2506-07. Texas has no judicially cognizable interest in this case and lacks standing to challenge the Guidance.

B. Respondents' Claims Are Unreviewable Because Deferred Action Is A Quintessential Exercise Of Prosecutorial Discretion, Not A Grant Of Benefits Or Immigration Status

The court below also erred in holding that Respondents' suit is reviewable under the APA. Under the majority's logic, *all* grants of deferred action are reviewable, simply because the recipients can then apply for work authorization, which allows them to participate in the legal economy and removes one barrier to eligibility for certain federal benefits. This contradicts both established law and the traditional practice of granting deferred action and work authorization on a classwide basis.

1. Respondents' suit is not reviewable under the APA because the Guidance is nothing more than the memorialization of the Secretary's decision to focus enforcement resources on high priorities for removal

by identifying and deferring action for certain low-priority immigrants. *Reno*, 525 U.S. at 483-85. Judicial review is not permitted where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That rule includes suits seeking to challenge deferred action, because "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

The court of appeals cited this rule in acknowledging that Respondents' suit would be unreviewable if the Guidance constituted a nonenforcement policy. *See* App 43a, 69a n.156. It nonetheless held that Respondents' suit was reviewable because, in its view, "[d]eferred action . . . is much more than nonenforcement: It would affirmatively confer 'lawful presence' and associated benefits on a class of unlawfully present aliens." App. 44a. This is incorrect. What the Guidance sets forth *is* a nonenforcement policy and nothing more, a systematic process by which certain immigrants can apply to the Secretary for consideration for the very same kind of deferred action that the Executive has granted over the past half-century. *Supra* Part I.B.1.

Contrary to the court of appeals' holding, the DAPA and DACA processes in the Guidance confer no benefits beyond the revocable decision to temporarily postpone the recipients' removal. App. 419a (the Guidance "confers no substantive right, immigration status or pathway to citizenship"). In the case of work authorization, that "benefit," as already discussed, arises from 8 C.F.R. § 274a.12(c)(14)), which was promulgated by notice-and-comment rulemaking during the administration of President

Reagan. The other "benefits" the court of appeals focused on are not part of DAPA. Rather, deferred action permits individuals to apply for work authorization, and they then must contribute a portion of their earning to programs for which they realistically are never going to be eligible, either because they will not have worked the requisite 10 years, or because they do not remain in the United States long enough to take benefits, or because they are still ineligible for benefits since they are not "qualified aliens" under federal law. *Supra* I.B.1.

The court of appeals avoided these facts by holding that "to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" App. 46a (quoting *Heckler*, 470 U.S. at 832). But because work authorization applies equally to all recipients of deferred action, this logic would render *all* grants of deferred action (including *ad hoc* grants) reviewable in federal court. App. 117a (dissent) ("Under this logic, any non-enforcement decision that triggers a collateral benefit somewhere within the background regulatory and statutory scheme is subject to review by the judiciary."). In this way, the ruling below essentially redefines "deferred action" in a way that directly conflicts with its longstanding, uncontroversial meaning. It converts deferred action into a form of immigration status conferring public benefits, simply because there are collateral consequences of deferred action that might theoretically make the recipient eligible for benefits under some other law.

The sound historical underpinnings of the Secre-

tary's practice of granting deferred action further demonstrate the error of the courts below. In 1999, this Court recognized and tacitly approved the use of deferred action in *Reno*, describing it as "prosecutorial discretion" and "a regular practice . . . of exercising [executive] discretion for humanitarian reasons or simply for [the Executive's] own convenience." *Reno*, 525 U.S. at 483-84 & 485 n.9. But at the time of that ruling, Section 274a.12(c)(14) had been used by the Executive for over a decade to grant work authorization to recipients of deferred action, including on a classwide basis. *Supra* Part I.B.1. Had the simple fact that deferred action allows recipients to then apply for work authorization been sufficient to demonstrate reviewability, it should have come up before, if not in *Reno* then in some other case in the many decades in which the same type of deferred action at issue here has been in use.

2. The court of appeals also erred in holding that Respondents' suit is reviewable because DAPA bestows "lawful presence." App. 43a-44a, 46a ("if deferred action meant only nonprosecution, it would not necessarily result in lawful presence"). Indeed, throughout its opinion the court repeatedly referred to the Guidance as granting "lawful presence," which it seemingly treated as a form of immigration status. App. 49a, 65a, 75a-76a. But "lawful presence" is not, and has never been, an immigration status. Instead, the Guidance states that "Deferred Action does *not confer any form of legal status* in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States." App. 413a (emphasis added). Being "lawfully present," that is, be-

ing undocumented, known to the Executive and temporarily allowed to remain in the country, is nothing more than a description of the immigrant's condition after she receives deferred action. App. 222a (Higginson, J., dissenting) ("legal *presence* simply reflects an exercise of discretion by a public official" (citation and quotation omitted)); App. 114a (dissent). It is not a status, benefit, or anything other than a way of describing the condition of an undocumented immigrant who has been granted deferred action and who, temporarily, is not being removed. It was error for the court to treat "lawful presence" as an affirmative grant of status rendering Respondents' APA claims reviewable.

C. The Deferred Action Guidance Is A General Policy Statement Not Subject To Notice-and-Comment Rulemaking

The court of appeals also erred in ruling for Respondents' procedural APA claim that the Guidance could only be issued by notice-and-comment rulemaking. Even assuming *arguendo* that Respondents have standing and the suit is reviewable, the Guidance is still nothing more than a general policy statement that guides the Secretary's *discretionary* grants of deferred action as a means of implementing the goals of the Prioritization Memorandum. As such, it is exempted from notice-and-comment procedures. 5 U.S.C. § 553(b)(A).

As this Court has explained, "[t]he central distinction among agency regulations found in the APA is that between 'substantive rules' on the one hand and 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or prac-

tice' on the other," with notice and comment being required for the former group of rules, but not the latter. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). The APA does not define what constitutes either a "substantive rule" or a "general statement[] of policy," but this Court has clarified that a substantive or legislative rule "affect[s] substantial individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974); *see Chrysler Corp.*, 441 U.S. at 301-02. In contrast to substantive rules, this Court has described "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quoting Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)).

The court below incorrectly held that the Guidance was a substantive rule, and thus subject to notice-and-comment procedures, because "DAPA would not genuinely leave the agency and its employees free to exercise discretion" and would instead "confer[] lawful presence on 500,000 illegal aliens residing in Texas." App. 64a-65a. However, as discussed, the Guidance "confers no substantive right, immigration status or pathway to citizenship," but merely allows for the temporary condition of being deprioritized for removal, a condition that can be rescinded at any time, without warning or recourse. App. 419a. Though individuals such as Intervenors would be affected by the Guidance since they could receive deferred action under its guidelines, they have no legal rights bestowed *by* the Guidance. And the power of granting deferred action, without being

bound not to rescind it, is one that has long been exercised by the Secretary and his predecessors.

This inescapably leads to the conclusion that the Guidance is a quintessential general statement of Executive policy—albeit an important one that would affect millions of undocumented immigrants. In the Guidance, the Secretary did nothing more than lay out a systematic process for exercising on a large scale the traditional Executive power, oft approved by Congress, to defer removals of certain undocumented immigrants. App. 414a-418a; 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(1)-(3). As Petitioners argue, the Guidance is an embodiment of the Secretary's policy decision about how best to focus the agency's limited enforcement resources: by refraining from taking action against a certain subset of low-priority immigrants, in favor of channeling funds to focus on removing immigrants who commit crimes, and who threaten public safety or national security. Pet. 29.

This point is dispositive—what is relevant to the "substantive rule" inquiry is not whether individual USCIS personnel have discretion to deny applications made under the Guidance, but that the Guidance itself is an exercise of discretionary power. Pet. 29-30. As Petitioners point out, the availability of discretion for lower-level employees, or lack thereof, does not determine whether the Guidance is a statement of policy. Rather, it is the Secretary's initial exercise of discretion in interpreting the INA and setting DHS priorities that make the Guidance a statement of policy. *See* App. 412a-414a, 419a (emphasizing agency-level discretion). Proving this point is the fact that the Secretary is not bound to

the policy: at any moment, he could issue a new memo, reflecting a different decision on immigration enforcement resource allocation and deferred action, with no consequence or need for formal procedure.

However, even if the court of appeals was correct that the question turns on whether lower-level USCIS employees have discretion, the outcome is the same. This is because, at every step of the implementation of the DAPA process and procedures laid out in the Guidance, employees are required to exercise discretion. DAPA sets forth factors for consideration, not rules. The Guidance instructs USCIS employees to make determinations "on a case-by-case basis," and each determination involves some level of discretion. App. 417a. Importantly, individual employees processing applications for deferred action must determine which priority tier an immigrant fits within, pursuant to the Prioritization Memorandum. Moreover, regardless of whether the employee determines in her discretion that an applicant is not a priority for removal and satisfies all the other DAPA criteria, she must still determine that there are "no other factors that, *in the exercise of discretion*, make[] the grant of deferred action inappropriate." App. 417a (emphasis added).

The court of appeals erred in ignoring this plain language of discretion in favor of the disputed evidence the district court relied upon—in particular, the court's erroneous conflation of DAPA and 2012 DACA. App. 55a-64a; App. 129a-146a (dissent). Despite acknowledging that "any extrapolation from DACA must be done carefully," App. 59a, the majority concluded that because DACA did not (in the majority's view) allow for discretion, DAPA similarly

would not permit USCIS officials to exercise discretion, and any statements to the contrary in the Memo were merely pretextual. App. 62a-64a. But as the dissent below cogently explained, the substantive criteria for immigrants to qualify under DAPA is different from that under DACA. App. 135a-136a. Most importantly (among other errors pointed out by the dissent), DACA does not refer DHS officials to the enforcement priority tiers utilized by DAPA that involve exercises of discretion in their own right, nor does DACA include the catchall factor instructing employees to assess, in their discretion, whether deferred action would be "inappropriate." The court of appeals erred in concluding that the yet-unimplemented Guidance would leave officials unable to exercise discretion and thus that notice-and-comment rulemaking was required.

D. The Secretary's Decision To Implement The Deferred Action Guidance Was Lawful

Finally, this Court should grant certiorari to review the court below's erroneous conclusion that the Guidance violates the law. In reaching this conclusion, the court of appeals not only fundamentally misapprehended what the Guidance is and what it would accomplish, but also called into question the validity of Section 274a.12(c)(14), the unrelated regulation that for decades has allowed the Secretary and his predecessors to grant work authorization to recipients of deferred action. Neither the Guidance nor Section 274a.12(c)(14) conflicts with the INA or any other law. Far from it, they comply fully with Congress's broad grants of authority as well as this Court's case law.

Congress has charged the Secretary "with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens[.]" 8 U.S.C. § 1103(a)(1). Moreover, Congress has expressly assigned the Secretary the responsibility for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). One of the matters over which the Secretary has authority is the removal of immigrants if "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law.'" *Arizona*, 132 S. Ct. at 2499; *see* 8 U.S.C. § 1182(a); 8 U.S.C. § 1227(a). Similarly, Congress has strongly implied that the Secretary has power to grant work authorization by defining "unauthorized alien[s]" for purposes of the unlawful employment statute as immigrants that are not either lawfully admitted for permanent residence or "authorized to be so employed by this chapter or by the [Secretary]." 8 U.S.C. § 1324a(h)(3).

If the Guidance actually granted a form of lawful immigration *status*, as the court below appears to have believed, it might conflict with the INA. *See, e.g.*, App. 71a-72a, 81a-82a. But, as made clear above, the Guidance does nothing more than spell out the criteria for making discretionary decisions to temporarily refrain from removing certain low-priority undocumented immigrants. This power is a "principal feature of the removal system." *Arizona*, 132 S. Ct. at 2499. The use of deferred action in one form or another extends back over sixty years as part of the discretion granted to the Executive to implement the congressionally imposed requirements of immigration law. Shoba Sivaprasad Wadhia, *The*

Role of Prosecutorial Discretion in Immigration Law, 9 Conn. Pub. Int. L.J. 243, 265 (2010). Congress has also incorporated deferred action into recent amendments to the INA by expressly approving, in certain specific instances, the Secretary's preexisting authority to grant deferred action. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i) (making certain children of domestic violence victims "eligible for deferred action"). Accordingly, the Guidance's use of the traditional tool of deferred action can hardly be considered inconsistent with, or a violation of, the INA.

The court of appeals' conclusion that DAPA violates the INA has three primary bases, all faulty. First, the court incorrectly viewed the Guidance as affirmatively granting recipients "lawful presence," which it apparently considered a new form of immigration status that conflicts with those provided for in the INA. App. 71a-72a, 81a-82a. But as described above, the Guidance does no such thing. It only allows recipients to be "lawfully present" for a temporary period. Undocumented immigrants who have been granted deferred action are only "lawfully present" in the sense that the Executive knows where they are and has decided to defer their removal.

To be sure, in the INA "Congress has enacted an intricate process" through which individuals may "derive a lawful immigration classification from their children's immigration status." App. 72a. But the process is "directed at the requirements for *legal status*, not the *lawful presence* permitted by DAPA." App. 148a (dissent, emphasis original). Similarly, the Secretary's ability to issue the Guidance is unaffected by other INA provisions describing specific situations in which the Secretary may grant deferred

action. App. 148a-150a (dissent). Deferred action, whether under the Guidance or on an *ad hoc* basis, is simply interstitial to the larger framework of immigration law, allowing the Secretary, where he deems it necessary or helpful, to temporarily decline to remove immigrants *without* providing them with legal immigration status. The "lawful presence" the court below found objectionable does not purport to be a separate category of immigration status, and as a result it does not conflict with the INA.

Second, the court below incorrectly believed that the legality of the Guidance hinged on the number of immigrants affected. The majority opinion takes the view that DAPA affects 4.3 million people at a stroke, and that such a sweeping change cannot have been contemplated by the INA. App. 76a. Not so. The Secretary has offered deferred prosecution on a classwide basis on numerous other occasions. *Supra* I.B.1; Pet. 7-8.

Third, the court of appeals erred in ruling that the Guidance is unlawful because it enables recipients to receive work authorization. *See* App. 75a-76a, 81a. Work authorization is not granted by the Guidance, as all recipients of deferred action are eligible for work authorization under 8 C.F.R. § 274a.12(c)(14). And since at least 1986, the Secretary and his predecessors have had statutory authority to authorize employment for immigrants who otherwise lack formal immigration status. *See* 8 U.S.C. § 1324a(h)(3); *cf.* 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987). The court of appeals was wrong to dismiss Section 1324a(h)(3) on the ground that it dealt only with "'[u]nlawful employment of aliens'—an exceedingly unlikely place to find authorization

for DAPA." App. 79a. That statute makes perfect sense as a basis for granting work authorization: it was enacted as part of a comprehensive scheme to punish employers for hiring unauthorized workers, and it expressly left the Secretary able to grant work authorization. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 127-29 (2015). Moreover, just several pages earlier in the court's opinion, it illogically used the INA's very same "careful employment-authorization scheme" as a basis for holding DAPA *unlawful*. App. 75a-76a. This flawed reasoning calls for the Court's review.

Respondents have not challenged the validity of Section 274a.12(c)(14) in this case, but the court of appeals' decision has nonetheless thrown the Secretary's authority to grant work authorization into serious question. This Court's review is necessary to confirm both that the Secretary's past grants of deferred action and separate grants of work authorization are lawful, and that the potential use of work authorization in conjunction with the Guidance is entirely consistent with the INA. It would be contrary to Congress's purpose in enacting the INA to invalidate work authorization, either broadly or as applied to the Guidance. As the INA itself notes, self-sufficiency is one of the "basic principle[s] of United States immigration law," 8 U.S.C. § 1601(1), and there is a "compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(7). Without the possibility of work authorization, recipients of deferred action can hardly be self-sufficient. The Court should grant review and affirm

both the Secretary's lawful decision to exercise his discretion in issuing the Guidance and his continued ability to grant work authorization.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 4, 2015